BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court did not render a written opinion. The order denying leave to intervene as entered appears on page 489 of the Record.

The order of the Circuit Court of Appeals for the Seventh Circuit, denying the Telephone Company's motion to dismiss petitioner's appeal, appears on page 522 of the Record. The Circuit Court of Appeals did not render a written opinion in deciding this motion.

The opinion of the Circuit Court of Appeals herein complained of is reported in 111 Fed. (2d) 136 (1940), and appears on page 539 of the Record.

Jurisdiction.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit was entered on April 4, 1940.

2. The judgment was rendered as a part of a proceeding in connection with a suit in equity originally filed by the Illinois Bell Telephone Company seeking a temporary and permanent injunction against the Illinois Commerce Commission to restrain the Commission from enforcing its telephone rate order of August 16, 1923. The Telephone Company failed to sustain its contentions and the proceeding was reversed and remanded with orders to refund all excess charges made in connection therewith. (*Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151 (1934).) The immediate proceeding upon

which this petition is based is the motion of John Lackner to file an intervening petition on behalf of himself as a subscriber of the Telephone Company and other similar subscribers to receive full reimbursement of overcharges paid by them to the Telephone Company in conformance with the mandate of this Court in the case of *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151 (1934).

3. The statute under which jurisdiction is invoked is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; U. S. C. Title 28, Section 347 (a).

Statement of the Case.

The facts are sufficiently stated in the petition, to which reference is made.

Specifications of Errors.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In failing to hold that the subscribers are entitled to notice of all proceedings involving said subscribers' personal property rights as represented by their interest in the fund constituting overcharges made by and paid to the Telephone Company by said subscribers.

2. By holding that the presence of representatives of the Illinois Commerce Commission and the City of Chicago in the District Court when the order of July 23, 1934, was entered allowing Messrs. Haight and Goldstein $1,500,000.00 fees, removed the disqualification of personal

interest of said attorneys and the further objection that said attorneys represented conflicting interests in that proceeding—their interest as beneficiaries of the fee,—and the interests of the subscribers, owners of the fund from which said fees were paid.

3. In holding that neither the petition nor the record disclose any justification for assuming that subscribers suffered any injury by reason of their not being a party to the record.

4. In holding that the unauthenticated photostatic copy of the check received by petitioner a year after the order of July 23, 1937, was entered, constituted actual notice of the refund proceedings in the District Court.

5. In holding that the application of the petitioner was not timely.

6. In holding that the subscribers accepted the benefits of the order complained of with full knowledge of and acquiescence in said order.

In the interest of brevity (Rule 38, Par. 2; *Furness, Withy & Co., Ltd.* v. *Yang Tsze Ins. Assn., Ltd.*, 242 U. S. 430), petitioner does not at this time set forth all of the points which will be urged at the arguments on the merits of this cause, should the writ be granted, nor all of the contentions in support of such points; but in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari (*Gunning* v. *Corley*, 281 U. S. 90, 98), petitioner here refers to and incorporates into this petition all the matters presented in its Statement of Points Relied Upon on the appeal to the Circuit Court of Appeals for the Seventh Circuit (R.

492), with the same force and effect as if herein set out in full.

Summary of Argument.

The points of argument follow in the main the reasons relied upon for the allowance of the writ of certiorari, and are stated in the index hereto *supra*, page i.

ARGUMENT.

I.

Failure of subscribers to receive notice of the proceedings whereby their pro rata share of the refund was reduced $2,197,000.00 was a violation of their constitutional rights guaranteed under the State and Federal Constitutions. The decision of the Circuit Court of Appeals holding to the contrary was in error.

(A) *No person shall be deprived of his property without due process of law.*

(B) *No valid allowance of attorneys' fees could be made unless notice was first given to the subscribers.*

While the appointment of attorneys to represent the subscribers without notice to said subscribers was contrary to law, the allowance to these attorneys of a fee of $1,500,000 to be paid out of the funds of said subscribers, was particularly obnoxious as a violation of said subscribers' constitutional rights guaranteed them under the provisions of the United States and State Constitutions. (5th Amendment of the Constitution of the United States; Sec. 2 of the Bill of Rights of the Constitution of the State of Illinois.) Our Illinois Supreme Court has definitely declared this to be the law. In the case of *Rabbitt* v. *Weber & Co.*, 297 Ill. 491, the Court said, on page 496:

> "Section 2 of the bill of rights provides that no person shall be deprived of life, liberty or property without due process of law, under which no citizen

can be deprived of property without due notice and an opportunity to be heard in defense and enforcement of his right. This Court expressed the principle in *Haywood* v. *Collins,* 60 Ill. 328, by saying that the very security of property requires notice of some kind to the owner before he should be deprived of it, and justice can never be administered in its true spirit when either the person or property is condemned without notice. The principle did not originate in the American system of constitutional law. (*Munn* v. *Illinois,* 94 U. S. 113.) It was preserved in Magna Charta but was known before and regarded as a part of the ancient English liberties (*Ochoa* v. *Hernandez y Morales,* 230 U. S. 139); and well it may have been, because it is fundamental in every conception of justice, and while it came to this country as a part of the common law, it is both the constitutional and statutory rule in the judicial system of the Federal government and of every state. Without notice and an opportunity to defend, the right of private property could not exist in the sense in which it is known to our laws, and this general principle has been frequently declared. (*Bickerdike* v. *Allen,* 157 Ill. 95; *Gage* v. *City of Chicago,* 225 *id.* 218; *Flexner* v. *Farson,* 268 *id.* 435; 6 R. C. L. 433; 12 Corpus Juris, 1228.) There is a necessary limitation in cases where the proceeding is merely *in rem* and the necessities of the case require substituted service, but even in such cases the statute must provide for such service and the notice required must be given. Due process of law prevents a divestiture of title without notice and an opportunity to be heard, and it is elementary that jurisdiction over parties is only obtained by notice, actual or constructive, and a judicial judgment pronounced without such jurisdiction is void. (*Campbell* v. *Campbell,* 63 Ill. 462.) Under the constitutional provision a party is not only entitled to notice of the proceeding against him but is also entitled to be heard in his defense. (*Hultberg* v. *Anderson,* 252 Ill. 607), and the rule extends to every right which a citizen has. (*Klafter* v. *Examiners of Architects,* 259 Ill. 15.)"

In *Merchants Bank of St. Joseph* v. *Chrysler,* 67 Fed. 388, where a fee was allowed an attorney without notice to his clients, the court said:

> "The parties to the suits, therefore, have an interest in the amount of such allowances, and according to well established principles they should have notice of application for such allowances and should be given an opportunity to defend. Any other practice might and would lead to great abuses."

The court in the case of *Cauther* v. *Cauther,* 56 S. E. 978 (Supreme Court S. C. 1907), in condemning the practice of *ex parte* hearings on attorneys' fees, said:

> "The fact that the inquiry relates to a claim for services rendered in the confidential relation of attorney and client only emphasizes the impossibility of representation in such circumstances."

The Court here indicated the impossibility of attorneys representing themselves as well as their client in a hearing pertaining to the allowance of a fee to said attorneys.

The above authorities were binding and effective upon the Circuit Court of Appeals under the decision of this Court in the case of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 78 (1938).

It is clearly apparent from the foregoing authorities that the orders complained of were complete nullities. They had no binding legal force or effect. Payments made under these orders were void. The subscribers have an undisputed right to insist that they be reimbursed for all such funds so paid out, particularly when they have failed to receive the full share of their refund moneys as ordered by the mandate of this Court in the instant case and the Telephone Company has in its possession unclaimed funds sufficient to make such reimbursement.

II.

The decision of the Circuit Court of Appeals that subscribers had no interest in the unclaimed funds is in conflict with applicable decisions of this Court, the Circuit Court of Appeals for the Seventh Circuit, and of other Circuit Courts of Appeals.

The petitioner herein was a subscriber of the Telephone Company prior to and during the years of 1923 to 1939, inclusive, during which time the respondent contested the valid rate order of the Illinois Commerce Commission. Petitioner together with thousands of other similar subscribers paid to the Telephone Company the excessive rates charged by it during that period.

This Court intended the subscribers should receive the full amount of these overcharges. (*Lindheimer et al.* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176.) By its mandate of May 30, 1934, it remanded the original case with instructions "to dissolve the interlocutory injunction, to provide for refunding in accordance with the terms of that injunction and of the bonds given pursuant thereto, of the amounts charged by the company in excess of the rates in suit, and to dismiss the bill of complaint."

The order granting the interlocutory injunction referred to in the mandate provided for the filing of a bond by the Telephone Company "conditioned so that in the event that this interlocutory injunction shall be hereafter dissolved the plaintiff shall refund to its several subscribers, either in cash or by credit, upon subsequent bills, any sums paid by them in excess of the sums chargeable to them pursuant to the provisions of said order of the Illinois Commerce Commission." (R. 3.)

The bond filed by the Telephone Company provided that it should repay* *with interest* "any sums paid by the said subscribers to the plaintiff for telephone service rendered such subscribers in excess of the sums chargeable to said subscribers, or any of them, pursuant to the provisions of the said order of the Illinois Commerce Commission." (R. 4-6.)

The District Court, in its opinion of December 23, 1937, referring to the above opinion of this Court said:

> "As we read that decision and as we now read it, we were only authorized to make refunds in accordance with the terms of the injunction and of the bond given pursuant thereto. This being so and as we again read the injunction and the bond and construe the word 'refund', we find ourselves limited to directing the Telephone Company to pay excess charges to its customers." (R. 446, 453.)

The Circuit Court of Appeals for the Seventh Circuit, in its opinion of August 9, 1938, denying the right of the State to the unclaimed balance, said:

> "The only provision in the mandate here material was that for the refunding in accordance with the terms of the injunction and the bond given pursuant thereto of the amounts charged by the plaintiff in excess of the rates fixed by the Commission. By express language of each, as heretofore related, such refund was for the benefit of plaintiff's subscribers." (*Illinois Bell Telephone Co.* v. *Slattery*, 98 Fed. (2d) 930, 933.)

This same court, in the decision herein complained of, said:

> "The mandate of the Supreme Court in *Lindheimer* v. *Illinois Bell Tel. Co., supra*, commanded the District Court to dissolve the interlocutory injunction and to provide for the refunding 'in accordance with

* Italics ours.

> the terms of that injunction and of the bonds given pursuant thereto, of the amount charged by the company in excess of the rates,' etc. The injunction decree was conditioned upon the repayment to subscribers of any sums paid by them in excess of the sums chargeable by reason of the order of the Illinois Commerce Commission, in case the injunction should thereafter be dissolved."

The Circuit Court of Appeals for the Seventh Circuit also in the case of *Illinois Bell Telephone Company* v. *James M. Slattery et al.*, 102 Fed. (2d) 58, referring to the decree of the District Court of June 11, 1934, entered in the present proceeding, and the $1,688,295.68 here in dispute, said:

> "A reading of this decree, as well as what transpired in court at the time of its entry, and subsequently, convinced us that neither the court nor any of the parties at that time had in mind, intended to or made provision for the disposition of funds which might remain in the possession of the plaintiff, unclaimed by subscribers after June 1, 1937, nor that there was any intention to release plaintiff of any liability for such unclaimed funds."

The District Court, therefore, made no final disposition of the unclaimed fund, nor did it release the Telephone Company of liability therefor when it entered its decree of February 5, 1938, but on the contrary made it subject to the interest of any of the subscribers as future circumstances might demand.

In *Merchants Bank of St. Joseph* v. *Chrysler*, 67 Fed. 388, where a fee was allowed an attorney without notice to his clients, the court set the order aside and held that the client had a definite interest in said proceeding and it was therefore necessary that attorneys give them notice of any such proceeding. The court said:

> "The parties to the suits, therefore, have an in-

> terest in the amount of such allowances, and according to well established principles they should have notice of application for such allowances and should be given an opportunity to defend. Any other practice might and would lead to great abuses."

The court in the case of *Cauther* v. *Cauther*, 56 S. E. 978, (Supreme Court S. C. 1907), in condemning the practice of *ex parte* hearings on attorneys' fees, said:

> "The fact that the inquiry relates to a claim for services rendered in the confidential relation of attorney and client only emphasizes the impossibility of representation in such circumstances."

All of the above clearly indicates that until the subscribers have been fully reimbursed for all overcharges they retain a definite interest in the funds created by said overcharges. It is not denied by the Circuit Court of Appeals that the subscribers have failed to receive full reimbursement. If the subscribers ever had any interest in the fund it was for full reimbursement, and until that objective was an accomplished fact their interest continued to remain in said fund.

To hold, as the Circuit Court of Appeals did in this case, to the contrary was clearly in error.

III.

The decision of the Circuit Court of Appeals in denying the right of petitioner to intervene in behalf of himself and other similar subscribers was in conflict with the provisions of Federal Rules of Civil Procedure, Subsection A, Rule 24.

As heretofore pointed out under Point II of this brief, the subscribers had a clear interest in the unrefunded balance. This being the fact, it necessarily follows that

it was error to deny petitioner's right to file his petition in behalf of himself and other similar subscribers. Rule 24, Subsection A, accords anyone the right to intervene "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof." (*U. S.* v. *C. M. Lane Lifeboat Co.*, 25 Fed. Supp. 410 (1938).)

Our courts have consistently held that when the above facts are present the defendant has an absolute right to intervene. In the case of *Credits Commutation Co.* v. *U. S.*, 91 Fed. 570, on page 573, the Court said:

> "It is doubtless true that cases may arise where a denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled and can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration, to which a third party reserves some right which will be lost in the event he is not allowed to intervene before the fund is dissipated. In such cases, the order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of intervener's claims by denying him all right to relief."

Also in the case of *United States Trust Co.* v. *Chicago Terminal Transfer Railway Co.*, 188 Fed. 292, on page 296, the Court said:

> "Applications for leave to intervene are of two kinds. In one the applicant has other means of redress open to him and it is within the court's discretion to refuse to encumber the main case with collateral inquiries. In the other, the applicant's claim of right is such that he can never obtain relief unless it be granted him on intervention in the pending case."

Again in the case of *Credits Commutation Co.* v. *U. S.*, 91 Fed. 570, the Court said:

> "There is a class of cases in which a party has the equitable right to intervene and the right to review by appeal any order denying that right. * * * This class includes those cases in which one claims a lien upon or an interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his interest therein can be established, preserved or enforced in no other way than by the determination and action of that court."

Similar conclusions were reached by the court in the case of *U. S.* v. *Philips*, 107 Fed. 824, and *Minot* v. *Mastin*, 95 Fed. 734.

Inasmuch as in the present case there was a fund in court undergoing administration, to which the defendant and similar subscribers as third parties had a right which would be lost in the event that he was not allowed to intervene before the fund was dissipated, it is respectfully submitted that defendant's application to intervene came clearly within the provisions of the law as set forth in the above cases and therefore the District Court erred in denying him the right to file his intervening petition herein.

IV.

The statutes of the State of Illinois provided a means whereby full restitution could be made without any expense to the subscriber.

The Illinois Revised Statutes 1939, Chap. 111⅔, Paragraph 76, (72) provides that—

> "When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after

> a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.
>
> "If the public utility does not comply with an order of the Commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in any court of competent jurisdiction, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the order of the Commission shall be *prima facie* evidence of the facts therein stated. If the petitioner shall finally prevail, he shall be allowed a reasonable attorneys fee to be taxed and collected as a part of the costs of the action."

This provision of the statute would have been available to all subscribers, including the defendant, if the "special attorneys" had not recommended to the District Court in their report of June 11, 1934, that "there be an injunction issued herein restraining all persons from any action to recover the refunds except through this Court." (R. 35.) This restraining order was accordingly provided for in the Court's decree of June 11, 1934, as follows:

> "8. No subscriber entitled to refunds hereunder shall have the right to maintain any remedy whatsoever to collect said refunds either in cash, by counterclaims or credit on bills in any manner except by action in this Court, and in this cause, and then only upon an affirmative showing that such subscriber has made application to the plaintiff for such refund and plaintiff, after having checked the claim of such subscriber, has refused to make payment. * * *" (R. 42.)

This restraining order resulted in subscribers being permanently barred from recourse to the above provision of the statute, brought about by action of attorneys who were appointed by the court without subscribers' knowledge, consent or notice to them, and who were ostensibly appointed to "protect" the subscribers' interests.

When the "special attorneys" presented their report recommending the restraining order and asking that they be allowed fees, they never advised the District Court of the above section of the statute whereby subscribers could collect the full amount of their refund, and if any expense for attorneys' fees was incurred the Telephone Company would have been compelled, under the said statutory provisions, to reimburse the subscribers for any such expense. This "protection" of the subscribers' interests by these "special attorneys" cost defendant and similar subscribers $1,815,599.04 for attorneys' fees and interest (R. 47, 377-455), neither of which would have been allowed under the foregoing statutory provisions.

It is, therefore, respectfully submitted that in this instance as well as others throughout the refund proceedings the protection of the interests of the defendant and similar subscribers was wholly and grossly inadequate, that said subscribers had a very definite interest in the $1,688,295.68 unclaimed balance, as they had not received the full amount of their refund in accordance with the decree of this Court, and further that under the prevailing law and facts of this case, the said subscribers would have been bound by the judgment entered by the District Court concerning the said sum of $1,688,295.68 and they had no other legal recourse than to assert their rights by means of an intervening petition in the present proceeding. It was, therefore, error to deny the defend-

ant the right to file his intervening petition in behalf of himself and other subscribers similarly situated.

V.

The refund check received by subscribers did not constitute legal process, and the District Court, therefore, lacked jurisdiction to enter any order affecting the private rights of the subscribers who were never parties to the proceeding. Lapse of time would not, therefore, bar subscribers' right to challenge the jurisdiction of the court in entering said order. Questions of jurisdiction may be raised at any time throughout the proceeding.

The refund check referred to by the Circuit Court of Appeals in its decision was an unauthenticated photostatic copy of a document which had been made a part of the record by that court without any showing as to the correctness of the said copy, the validity of the signature appearing thereon, or as to the correctness of the contents thereof. It was issued in the name of the Illinois Bell Telephone Company and consisted of a number of very fine printed items followed by figures indicating the amount due. It did not purport to be issued under the authority of any particular court. There was no indication or reference on the face of the document that it was issued in connection with any specific legal proceeding. No title of said proceeding was indicated, the name of the court was not shown, neither was there any court number by which a case could be identified. In fact, there was nothing about the document that would direct the average layman's attention to any reference whatever concerning court proceedings in which court orders had been entered. The important items were in prominent

black type—amount to be paid and the name of the payee. All else was blurred into the body of the check in an insignificant and unobtrusive manner. The "process of law" required by the Constitution certainly never contemplated a document of this character as fulfilling that requirement. Lawful process in any proceeding manifestly refers to process emanating from a court or by the authority of a court, and cannot be understood to refer to such acts or notices *in pais* between private parties as derive no authority from a court. Process of law in a broad sense means law in its regular course of administration through courts of justice. (50 C. J., Sec. 11, page 445; *Healey* v. *Geo. F. Blake Mfg. Co.*, 180 Mass. 270, 62 N. E. 270; *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431; 2 Coke Inst. pp. 51, 52; *State* v. *Shaw*, 73 Vt. 149.) Such attributes could not legally be given to the check received by the subscribers of the Telephone Company.

The District Court's orders allowing attorneys' fees, litigation expense to third parties, and waiving interest requirements of the injunction bond, was in every sense a judgment of that court whereby the subscribers were deprived of their property to the extent of the sum involved in each order. At the time of the entry of these orders the subscribers were not parties to the proceedings in which the said orders were entered. (111 Fed. (2d) 136 (1940).) All of these orders were entered without process having been issued to the subscribers or the court having obtained jurisdiction of their person. Process is necessary in order to acquire jurisdiction to proceed against a person or warrant an adjudication by the court of the property rights of persons interested in the subject matter of the controversy, or authorize an order in summary proceedings *in personam* against a third party

not a party to the suit, or render a judgment valid and conclusive, and these requisites are necessary even though the person has knowledge of the suit. (50 C. J., Sec. 17, page 446; *Flexner* v. *Farson,* 268 Ill. 435, 109 N. E. 327; *In re Utah Constr. Co.'s Water Right,* 30 Fed. (2d) 436, 440; and *McCoy* v. *Watson* (Miss.), 122 S. 368, 370.)

Mere publication over the Telephone Company's name of notice to apply for refunds could not of necessity be a valid substitute for court process. No legal means was ever taken to bring any of the subscribers within the jurisdiction of the court, so as to give the court authority to dispose of any of the subscribers' property rights.

There must be some service on the defendant in some mode authorized by law or the court cannot proceed, and a judgment rendered without such service is a nullity. So the rule prevails that service of process or the prescribed legal or statutory notice is always a prerequisite to jurisdiction over either the person or property and the statutory mode of service or of giving notice must be followed, including requirements as to time. * * * A person's knowledge of the existence of an action, no matter how clearly brought home to him, does not supply the want of compliance with the statutory or legal requirements as to service, nor does a person's mere presence in court give jurisdiction to enter a judgment against him when he was not brought there by any legal means. (15 C. J., Sec. 96, page 798.)

The court therefore lacked jurisdiction at the time of the entry of these orders and all of its actions, in so far as the subscribers were concerned, were an absolute nullity. When petitioner presented his petition to the District Court, he challenged that jurisdiction and did so prior to the final disposition of the refund proceeding.

He had the legal right to do so at any time throughout the refund litigation. (*Smith* v. *Woolfolk*, 115 U. S. 143; *People* v. *Miller*, 339 Ill. 573, 578.)

The Circuit Court of Appeals was therefore in error in holding that the right of petitioner to file his petition herein was properly denied by the District Court because his application had not been timely.

VI.

The check received by subscribers does not constitute a bar to full reimbursement for moneys paid to the Telephone Company account of excess telephone service rates.

The demand in this case was liquidated and at the time of the receipt of the check by subscribers it was likewise due. It was for a sum less than the amount due the subscribers under the mandate of this Court. Where a demand is liquidated and is due, payment and receipt of a less amount is not a satisfaction of the demand, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given. Payment of less than is due operates only as a discharge of the amount paid, leaving the balance still due. (1 C. J., Sec. 40, pages 539-40.)

The reason for the rule is that the agreement is without consideration and void, as the debtor is under an obligation to pay the whole debt at the time and the creditor is entitled to receive the whole. In the absence of statute providing otherwise, the rule is settled that the giving of a receipt in full does not in any way affect the rule that payment of a less sum in discharge of a greater sum presently due is not a satisfaction thereof, although ac-

cepted as such, as the element of consideration is lacking, and it is immaterial that the receipt was given with knowledge of the facts and that there was no error or fraud. (1 C. J., Secs. 41 and 45, pages 541 and 543; *Chicago, etc., R. Co.* v. *Clark,* 92 Fed. 968; *Bingham* v. *Brouning,* 97 Ill. App. 442, and *Ryan* v. *Ward,* 48 N. Y. 204, 8 Am. R. 539.)

It must therefore follow that the receipt of the refund check by subscribers in no way affected their right to demand full payment of their claim against the Telephone Company.

We believe it pertinent to call to this Court's attention the fact that another effort was made to intervene in behalf of the subscribers in this case. (*Berman* v. *Illinois Bell Telephone Co.,* 304 U. S. 549.) The effort did not meet with success. There is a vast difference between the nature of that proceeding and the present one. In the former, Berman in substance claimed the District Court had "made a mistake in administering a trust fund" as represented by the excess payments made by the subscribers. No constitutional question was raised in that proceeding, as has been done in this case. Neither did Berman challenge the jurisdiction of the District Court to enter any of the orders complained of herein, as does the present proceeding. The Berman proceeding presented no question which properly called for consideration by this Court, and an order was accordingly entered affirming the action of the District Court in denying him the right to intervene. Inasmuch as there is a clear distinction in the issues presented by this case as distinguished from the Berman case, it is respectfully submitted that the ruling in the Berman case can in no manner affect the merits of the present petition.

CONCLUSION.

We have endeavored to demonstrate the vital importance of the issues involved in this case, not only to the immediate subscribers, but to the many thousands of subscribers to other public utility service who are at the present time and in all probability will be in the future placed in the same position as the Telephone Company subscribers find themselves today. At the present time the Gas Company of this city is engaged in refunding a sum in excess of $3,000,000.00 to its subscribers. Other utilities throughout the country are doubtless engaged in similar proceedings. No legal precedent has been established that finally determine the subscribers' rights in matters of such vast importance and involving unusually large sums of money belonging to the public generally.

Two major issues presented here—constitutional guarantee and jurisdiction of the court—seem to be clear cut and sharply defined. We respectfully submit that the writ of certiorari should be issued in order that this unsatisfactory condition may be disposed of finally and effectively by this Honorable Court.

Respectfully submitted,

MELVIN L. GRIFFITH and
JOHN C. DEWOLFE,
Counsel for John Lackner, Petitioner.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 7010. OCTOBER TERM, 1939, JANUARY SESSION, 1940.

JOHN LACKNER, *Appellant*,
vs.
ILLINOIS BELL TELEPHONE COMPANY, ET AL., *Appellees*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 4, 1940.

Before MAJOR and TREANOR, *Circuit Judges*, and SULLIVAN, *District Judge*.

TREANOR, *Circuit Judge*. This is an appeal from an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, which denied appellant's petition for leave to intervene after final decree in the case of *Illinois Bell Telephone Company* v. *Slattery*,[1] final decree in that case having been affirmed by this court before the present appeal was taken. The purpose of the petition to intervene was to set aside the aforesaid final decree and set aside or modify other decrees previously entered in the course of the litigation in the Chicago Rate Refund case.[2]

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1 102 Fed. 2nd. 58, Certiorari denied 307 U. S. 648.

2 For various phases of this litigation see *Smith* v. *Ill. Bell Tel. Co.*, 269 U. S. 531; Id., 282 U. S. 133, 51 S. Ct. 65; Id., 283 U. S. 808, 51 S. Ct. 464; *Ex parte Smith*, 283 U. S. 794, 51 S. Ct. 482; *Illinois Bell Telephone Co.* v. *Slattery*, 98 Fed. 2nd. 930; Id., 102 Fed. 2nd. 58; *Lindheimer et al.* v. *Ill. Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658

As a result of the judgment of the United States Supreme Court in *Lindheimer* v. *Illinois Bell Tel. Co., supra,* Note 2, the District Court undertook to administer the refunding of the amount of overcharge of subscribers of the Telephone Company. The magnitude of the operation, which involved 1,495,947 refunds amounting to a total of over $18,000,000, necessarily required elaborate machinery. To secure adequate protection of the interests of subscribers the District Court designated Messrs. George I. Haight and Benjamin F. Goldstein, who had conducted the litigation as special counsel for the City of Chicago, to act as counsel for the subscribers to "protect and preserve" their rights and interests. In its decree of June 11, 1934, the District Court limited the period for the filing of claims, ordered that the refund period should terminate June 1, 1937, and that with the expiration of the refund period the Telephone Company should be released "as to all refunds which it has not been able to make in compliance herewith."

At the expiration of the refund period on June 1, 1937, the Telephone Company made its final report to the District Court and petitioned that the court determine that the Telephone Company had complied with the prior court orders in respect to the refunds and further asked that the termination of its liability for further refunds be confirmed. Despite the most extensive efforts to reach the subscribers and to get them to file claims a large number of claims were not presented within the refund period; and at the expiration of the period there remained unrefunded in claims and interest thereon the sum of $1,688,296. The Telephone Company, however, was entitled as an offset for unpaid bills to at least one-third of the foregoing sum.

The City of Chicago, the County Treasurer of Cook County, Illinois, and the State of Illinois each presented petitions seeking to secure the unclaimed overcharges. By decree of February 5, 1938, the District Court denied the petitions of the City of Chicago and of the State of Illinois and dismissed the petition of the Treasurer of Cook County, confirmed the termination of liability of the Telephone Company to make further refunds, and closed the proceedings. The decree of the District Court was affirmed by this Court February 22, 1939. (*Ill. Bell Tel. Co.* v. *Slattery, supra.*)

On March 2, 1938, Lackner, appellant herein, presented his petition to the District Court for leave to intervene on

behalf of himself, all other subscribers, customers and other persons similarly situated. It is the general theory of the petition that a 7½% deduction from the amount of petitioner's refund to pay attorney's fees was an illegal deduction and that there is still available in the control of the Telephone Company unrefunded overcharges from which to pay petitioner and other subscribers the 7½% deduction.

It is clear that petitioner has no interest in the so-called unclaimed refunds. It is petitioner's theory, as stated in his brief, that he failed to receive full payment of his claim against the defendant company because of the 7½% deduction for attorney's fees and the waiver of part of the interest, and, also, because of the illegal allowances for litigation expenses. In his petition, however, petitioner claims underpayment only in the amount of the deduction of 7½% for attorney's fees. There is no allegation of fact in the petition to disclose that any portion of the petitioner's claim is included in the total of the unclaimed overcharges. And in fact the Telephone Company, acting under the order of the District Court, deducted the 7½% and paid it to the attorneys. Petitioner cannot base his claim to intervene upon the ground that he has any interest in the unclaimed overcharges.

The mandate of the Supreme Court in *Lindheimer* v. *Illinois Bell Tel. Co., supra,* commanded the District Court to dissolve the interlocutory injunction and to provide for the refunding "in accordance with the terms of that injunction and of the bonds given pursuant thereto, of the amount charged by the company in excess of the rates," etc. The injunction decree was conditioned upon the repayment of subscribers of any sums paid by them in excess of the sums chargeable by reason of the order of the Illinois Commerce Commission, in case the injunction should thereafter be dissolved. The bond secured the repayment of any excess charges "in such way and manner as the District Court" should thereafter direct.

Under the mandate of the Supreme Court in the Lindheimer case the District Court was required to provide the machinery for the repayment to subscribers of the excess charges. In view of the magnitude of the task it was necessary that the District Court exercise a wide discretion in working out the details, both for the purpose of insuring an accurate determination of the

amount of excess charges and for the purpose of getting notice to individual subscribers. During the period of litigation ending with the decision of the Supreme Court in the Lindheimer case the subscribers had been represented by the Illinois Commerce Commission through the Attorney General of Illinois, and by the City of Chicago, through its corporation counsel and special counsel, Messrs. Haight and Goldstein. On June 1, 1934 the District Court designated Messrs. Haight and Goldstein to represent and protect the interests of subscribers during the refunding operation; and on July 23, 1934, the District Court fixed the compensation of the attorneys at 7½% of the amount which the telephone company had been ordered to repay to its customers. This order authorized and directed the Telephone Company to deduct "from the customer's refund seven and one-half per centum (7½%) of the amount of refund due to the customers."

The appointment of special counsel to represent the subscribers was made with the approval of the Illinois Commerce Commission and the City of Chicago. Special counsel for subscribers recommended a plan for making the refunds to the subscribers and it was approved by the District Court and incorporated in the decree of June 11, 1934. This decree specified that the amount of "suitable attorney's fees and compensation out of the refund" would be determined later. The decree of June 11 fixed the end of the period for refund and provided that the liability of the Telephone Company should terminate as of that date, June 1, 1937; and as stated above it provided for the payment of the fees of the special attorneys out of the amount of the subscribers' refunds. In general the order of June 11 fixed the rights and liabilities of all the parties. The later order of July 23, 1934, definitely fixed the compensation of the special attorneys at 7½% of the amount which the Telephone Company had been ordered to pay to its customers.

Petitioner does not complain in his petition of any violation of his rights by the order of June 11, 1934; but does claim that the District Court, by its decree of June 1, 1934, designating Haight and Goldstein as special counsel to protect and preserve the rights of the various subscribers, and the order of the court of July 23, 1934, allowing fees to these attorneys and authorizing the Tele-

phone Company to deduct 7½% from the amount of the refund due each customer, and the final decree of the District Court of February 5, 1938, were made without notice to the subscribers and without an opportunity to be heard; and that by reason of the foregoing the petitioner was deprived of property without due process of law.

The record discloses adequate representation of the petitioner and other subscribers at the hearing of June 1, 1934 at which time the court ordered the appointment of special counsel to protect the interests of the subscribers and authorized the counsel to present a refunding plan. All subscribers were represented by the Attorney General of Illinois acting for the Illinois Commerce Commission and corporation counsel acting for the City of Chicago. The record facts do not support petitioner's contention that he was deprived of property without due process of law by reason of lack of representation at the hearing of June 1, 1934.

The petition contains no attack on the validity of the order of June 11, 1934, although this order is the basis of the entire refunding operation, fixes the rights of the parties, and makes the fees of the special attorneys a charge against the total amount of the refunds to the subscribers. Petitioner questions the validity of the order of July 23, 1934 only "insofar as it fixes the fees of said attorneys," and only on the ground that the order was made without notice to the subscribers and without an opportunity for them to be heard.

The appointment of the special attorneys to represent the subscribers in the refunding operation and to provide a special protection for their interests in the refund of overcharges did not end the representation of the subscribers by the Illinois Commerce Commission and the City of Chicago. Consequently, the contention of petitioner that the subscribers were not adequately represented at the hearing of July 23, 1934 because of the personal interest of Haight and Goldstein in the fixing of the amount of their fees, must be considered in the light of the representation of subscribers by the Commerce Commission and the City of Chicago, through their respective counsel, who had no interest adverse to that of the subscribers and who were still charged with a duty to protect the subscribers' interest. Granting the validity of the order of June 11, 1934, the action of the District

Court of July 23, 1934, fixing the amount of the fees could have been questioned only in respect to the reasonableness of the amount. The record discloses that there was a hearing and that the court gave consideration to different factors in arriving at the amount. Furthermore, the District Court had been in close touch with the entire refunding operation and had first-hand knowledge of the value of the services rendered by counsel and likewise was familiar with the amount of labor and expense involved in the performance of these services. What constituted a reasonable allowance for fees was a question to be determined by the District Court, and even upon a direct appeal from the order of allowance the only basis for an overruling of the decision of the trial court would have been an abuse of discretion. The petition contains no general charge of fraud or deceit or collusion in respect to any of the orders of the District Court and there is an entire absence of allegations of fact which would constitute fraud or deceit or collusion. We cannot assume that the order fixing the amount of the fee was invalid or erroneous merely because it may appear to be an unusually large fee; and neither the petition nor the record facts disclose any justification for our assuming that petitioner suffered any injury by reason of his not being a party of record.

There is a factual situation which would preclude the petitioner's recovery of the amount of deduction from his overcharge for attorney's fees, even if permitted to intervene. In April, 1935, petitioner received payment of his claim for the amount of the overcharge. This check shows that the amount of the overcharge was $13.96; that the interest allowed thereon was $4.96, and that the amount deducted for petitioner's contribution to the payment of subscribers' attorneys was $1.42. The check recites that the refund was "pursuant to order of the District Court of June 11, 1934;" that the payment of interest was as ordered by the District Court June 11, 1934; and that the deduction was for fees to be paid to subscribers' attorneys as ordered by the District Court July 23, 1934. The notation respecting the deduction indicated that there was an allowance of 7½% as fees. Thus the petitioner had actual notice as early as April, 1935, that 7½% of the amount of his overcharge had been deducted for attorney's fees in accordance with the order of the District Court of July 23, 1934. The final decree in the

proceedings was not entered until February 5, 1938, and petitioner did not present his petition for leave to intervene until March 2, 1938. It cannot be said that petitioner's petition to intervene was timely; and in our opinion it would be a misapplication of the rule permitting intervention to allow petitioner to intervene after final judgment to upset an order of the court of which he had actual notice more than two years prior to final judgment, and, especially so, when it appears that he had accepted the benefits of the order with full knowledge of, and acquiescence in, that portion of the order of which he now complains. We are of the opinion that the District Court did not err in denying petitioner's petition to be permitted to intervene.

The order of the District Court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.